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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

In re FACEBOOK BIOMETRIC
INFORMATION PRIVACY LITIGATION

) Master File No. 3:15-cv-03747-JD

) CLASS ACTION

This Document Relates To:

) PLAINTIFFS' SUPPLEMENTAL BRIEF IN
) SUPPORT OF MOTION FOR APPEAL
) BONDS

ALL ACTIONS.

) Judge: Hon. James Donato
) Courtroom: 11 – 19th Floor
) Hearing Date: Vacated pending further
) order

1 Per the Court's May 24, 2021 order, Plaintiffs provide the following supplemental
2 statement regarding the amount of the appeal bond requested in this action:

3 1. Three categories of costs are likely to be taxable against the objectors in each of
4 these appeals: printing costs, transcript costs, and costs of securing the class's money pending
5 appeal. Those costs will add up to far more than \$5,000.

6 2. First, the costs of printing briefs will be taxable. The Ninth Circuit typically
7 requires seven copies of appellate briefs and four copies of excerpts of records for the court, and
8 it allows recovery for an additional copy of each for counsel. Ninth Circuit Rule 39-1.2. At the
9 rate of \$0.10 per page, Ninth Circuit Rule 39-1.2, Plaintiffs estimate these printing costs will be
10 about \$100 per appeal.

11 3. Second, the costs of transcripts of the preliminary and final approval hearings will
12 be taxable. These total \$613.60.

13 4. Finally, there is the cost of preserving the class's right to the settlement funds
14 pending the appeal. Federal Rule of Appellate Procedure 39(e)(3) provides that the costs of
15 "premiums paid for a bond or other security to preserve rights pending appeal" are taxable. The
16 security at issue here is in the form of an escrow account, in which Facebook has deposited the
17 \$650 million settlement fund. *See Int'l Telemeter Corp. v. Hamlin Int'l Corp.*, 754 F.2d 1492,
18 1495 (9th Cir. 1985) (holding that an escrow account is a type of security that can be used to
19 preserve rights pending appeal). The entity holding the escrow account, Citibank, charges two
20 basis points per year (0.02%) as a monthly premium to maintain the funds. (Exhibit 1.) The
21 amount in escrow for the benefit of the class plus the 15% holdback of attorneys' fees
22 (approximately \$564,366,535.74) is currently required to remain in that account until the
23 Effective Date of the Settlement has been reached and the claims can be paid. The monthly
24 premium paid to Citibank for holding those funds in escrow is approximately \$9,400.

25 5. The cautionary tale of *Gascho v. Global Fitness Holdings, LLC*, 875 F.3d 795
26 (6th Cir. 2017), explains why this cost is necessary. In that case, an objector's appeal delayed the
27 finality of the judgment approving class action settlement for nearly three years. *Id.* at 798. Class
28 counsel did escrow the money to pay the class but took no steps to secure the funds necessary to

1 pay class counsel and the settlement administrator, which were still held by defendants. *Id.* at
 2 799. By the time the judgment was final, the money was gone. *Id.* Reversing the district court’s
 3 contempt order, the Sixth Circuit determined that the defendant had “no legal obligation to
 4 conserve funds to pay class counsel and the claims administrator while the appeals were
 5 pending.” *Id.* at 802. Rather, “[i]f the plaintiffs wanted to ensure that [the defendant] would be
 6 able to pay class counsel and the claims administrator, they could have insisted that [the
 7 defendant] escrow those funds during the appeals.” *Id.* at 801. Nothing in the *Gascho* opinion
 8 suggests that the outcome would have been any different if it had been the class’s money at
 9 stake. *See id.* at 799 (“Fortunately for the class members, the payments Global Fitness owed to
 10 them had been placed in escrow under the terms of the settlement agreement.”). While Facebook
 11 does not appear to have shaky finances like the defendant in *Gascho*, taking a multi-year risk by
 12 letting any private defendant hold onto over half a billion dollars in settlement funds would have
 13 bordered on malpractice. *See generally In re Lehman Bros. Holdings Inc.*, 970 F.3d 91, 95 n.1
 14 (2d Cir. 2020) (“When it filed for bankruptcy, [Lehman Brothers] held consolidated assets of
 15 \$639 billion and liabilities of \$613 billion.”); *In re Enron Corp.*, 419 F.3d 115, 118 (2d Cir.
 16 2005).

17 6. Plaintiffs recognize that Rule 39(e)(3) is more typically applied in the context of a
 18 supersedeas bond paid by a defendant to avoid immediate execution on the judgment. *See City of*
 19 *San Antonio, Texas v. Hotels.com, L. P.*, No. 20-334, 2021 WL 2144536, at *2 (U.S. May 27,
 20 2021). But the language of the rule plainly does not limit the cost recovery to bonds or other
 21 security for the purpose of obtaining a stay of execution of judgment under Fed. R. Civ. P. 62(b).
 22 Rather, it refers to any “bond or other security to preserve rights pending appeal,” which, as
 23 explained above, is precisely the function of the escrow account here. Indeed, other courts have
 24 permitted similar expenses to be considered in setting an appeal bond. *See, e.g., Redwen v. Sino*
 25 *Clean Energy, Inc.*, CV 11-3936 PA (SSX), 2013 WL 12128684, at *2 (C.D. Cal. Dec. 20, 2013)
 26 (collecting cases for the proposition that “many district courts in this Circuit have interpreted
 27 Rule 7 to include increased expenses in settlement administration and administrative costs
 28

1 pending appeal”); *In re Nutella Mktg. & Sales Practices Litig.*, 589 Fed. Appx. 53, 61 (3d Cir.
2 2014) (agreeing that “administrative costs” could be considered in setting an appeal bond).

3 7. If there were any doubt, this district’s local rules are even more clear. Local Rule
4 54-3(h) provides that “[p]remiums on undertaking bonds and costs of providing security required
5 by law, by order of a Judge, or otherwise necessarily incurred are allowable.” Here, the Court
6 ordered that “the remaining settlement fund be distributed pro rata to claiming class members,
7 consistent with the Settlement Agreement and as expeditiously as possible” and that “[t]he
8 parties will comply with all other provisions of the Settlement Agreement[.]” The Settlement
9 Agreement requires that the funds be deposited into an escrow account managed by Citibank,
10 that the money be kept in that account until the settlement is effective and payments are made to
11 class members, and that the costs of maintaining the settlement account be paid from the
12 settlement fund. (Settlement Agreement, dkt. 468, §§ 1.14, 1.30, 2.1.) In other words, the
13 payments to Citibank are costs of the providing security required by the Court’s order, and those
14 costs will be taxable in this Court if the objectors do not win their appeals.

15 8. Given that the average time to resolve a civil appeal in the Ninth Circuit is 12 to
16 20 months, there is no reasonable possibility that the cost of maintaining the escrow account will
17 be under \$5,000. *See* U.S. Court of Appeals for the Ninth Circuit, Office of the Clerk, Frequently
18 Asked Questions, <https://www.ca9.uscourts.gov/content/faq.php> (December 1, 2019). It will
19 likely be a six-figure sum. Nevertheless, to avoid asking for an appeal bond that might chill the
20 appeal right of an objector (even one whose lawyer is engaged in objector blackmail), Plaintiffs
21 limited their bond request to \$5,000. If the Court of Appeals awards costs in their favor, they will
22 seek the full amount.

1 DATED: June 1, 2021

s/ Alexander G. Tievsky
Class Counsel

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